IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

S&P GLOBAL MARKET INTELLIGENCE INC.,	:	Case No.: 1:16-cv-1077
	:	
	:	Judge Timothy S. Black
Plaintiff,	:	
	:	
vs.	:	
	:	
FIFTH THIRD BANK,	:	
	:	
Defendant.	:	

DEFENDANT FIFTH THIRD BANK'S ANSWER TO PLAINTIFF S&P GLOBAL MARKET INTELLIGENCE INC.'S COMPLAINT AND COUNTERCLAIM (WITH JURY DEMAND)

For its response to Plaintiff's Complaint, Defendant Fifth Third Bank ("Fifth Third") hereby states as follows:

FIRST DEFENSE

1. Fifth Third admits that Plaintiff has purported to bring the claims listed, denies that Plaintiffs have properly stated those claims, denies the claims on their merits, and denies the remaining allegations of paragraph 1.

2. Fifth Third states that the agreements in question terminated, and denies the remaining allegations in paragraph 2.

3. Fifth Third denies the allegations in paragraph 3.

PARTIES

4. Fifth Third lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 4 and therefore denies such allegations.

5. Fifth Third admits the allegations in paragraph 5.

JURISDICTION AND VENUE

6. Fifth Third denies the substance and validity of the claims at issue in paragraph 6, but admits that there is jurisdiction over the dispute.

7. Fifth Third admits the allegations in paragraph 7.

FACTUAL BACKGROUND

8. Fifth Third lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 8 and therefore denies such allegations.

9. Fifth Third lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 9 and therefore denies such allegations.

10. Fifth Third admits that it is a banking institution organized under the laws of the state of Ohio and that it offers a variety of banking services, and denies the remaining allegations in paragraph 10.

11. Fifth Third admits that it entered into a Master Subscription Agreement on or about February 23, 2009, admits that Mr. Carroll signed the agreement, states that the terms of the agreement speak for themselves, and further states that it lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 11 and therefore denies such allegations.

12. Fifth Third states that the terms of the agreement speak for themselves and denies the remaining allegations in paragraph 12 to the extent they are inconsistent with those terms.

13. Fifth Third states that the terms of the agreement speak for themselves and denies the remaining allegations in paragraph 13 to the extent they are inconsistent with those terms.

14. Fifth Third states that the terms of the agreement speak for themselves and denies the remaining allegations in paragraph 14 to the extent they are inconsistent with those terms.

15. Fifth Third states that the terms of the agreement speak for themselves and denies the remaining allegations in paragraph 15 to the extent they are inconsistent with those terms.

16. Fifth Third admits that it entered into an attachment to the MSA on or about July 1, 2012, and that Mr. Kosch signed the agreement, states that the terms of the agreement speak for themselves, and denies the remaining allegations in paragraph 16.

17. Fifth Third states that the terms of the agreement speak for themselves, denies that Plaintiff delivered what it promised, and denies the remaining allegations in paragraph 17.

18. Fifth Third states that the terms of the agreement speak for themselves, denies that Plaintiff delivered what it promised, denies that the necessary performance metrics required for extension were reached, and denies the remaining allegations in paragraph 18.

19. Fifth Third states that the terms of the agreement speak for themselves, denies that Plaintiff delivered what it promised, denies that the necessary performance metrics required for extension were reached, and denies the remaining allegations in paragraph 19.

20. Fifth Third denies the allegations in paragraph 20.

21. Fifth Third denies the allegations in paragraph 21.

22. Fifth Third states that the terms of the agreement speak for themselves, and denies the remaining allegations in paragraph 22 to the extent they are inconsistent with those terms.

23. Fifth Third states that the terms of the agreement speak for themselves, and denies the remaining allegations in paragraph 23 to the extent they are inconsistent with those terms.

24. Fifth Third states that the terms of the agreement speak for themselves, and denies the remaining allegations in paragraph 24 to the extent they are inconsistent with those terms.

25. Fifth Third denies the allegations in paragraph 25, denies that the necessary performance metrics required for extension were reached, and states that any indication by Fifth Third regarding S&P's work was not directed to the relevant period or metrics.

26. Fifth Third denies the allegations in paragraph 26, denies that the necessary performance metrics required for extension were reached, and states that any indication by Fifth Third regarding S&P's work was not directed to the relevant period or metrics.

27. Fifth Third denies the allegations in paragraph 27, denies that the necessary performance metrics required for extension were reached, and states that any indication by Fifth Third regarding S&P's work was not directed to the relevant period or metrics.

28. Fifth Third denies the allegations in paragraph 28, denies that the necessary performance metrics required for extension were reached, and states that any indication by Fifth Third regarding S&P's work was not directed to the relevant period or metrics.

30. Fifth Third denies the allegations in paragraph 30.

31. Fifth Third denies that Plaintiff delivered what it promised, denies that the necessary performance metrics required for extension were reached, and lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 31 and therefore denies such allegations.

32. Fifth Third admits that it entered into an amendment on or about October 1, 2012, and that Mr. Kosch signed the agreement, states that the terms of the agreement speak for themselves, and denies the remaining allegations in paragraph 32.

33. Fifth Third states that the terms of the agreement speak for themselves and denies the remaining allegations to the extent they are inconsistent with those terms.

33. Fifth Third admits that it entered to an agreement on or about October 1, 2012, and that Mr. Bultoma signed it, states that the terms of the agreement speak for themselves, and denies the remaining allegations in paragraph 33 to the extent they are inconsistent with the terms of the agreement.

34. Fifth Third states that the terms of the agreement speak for themselves and denies the remaining allegations in paragraph 34.

35. Fifth Third states that the terms of the agreement speak for themselves and denies the remaining allegations in paragraph 35 to the extent they are inconsistent with those terms.

36. Fifth Third states that the terms of the agreement speak for themselves and denies the remaining allegations in paragraph 36 to the extent they are inconsistent with those terms.

37. Fifth Third states that the terms of the agreement speak for themselves and denies the remaining allegations in paragraph 35 to the extent they are inconsistent with those terms.

38. Fifth Third denies the allegations in paragraph 38.

39. Fifth Third denies the allegations in paragraph 39.

40. Fifth Third denies the allegations in paragraph 40.

41. Fifth Third denies the allegations in paragraph 41.

42. Fifth Third admits that it gave notice regarding the termination of the agreement more than 90 days before the end of the term, states that this notice was effective, and denies the remaining allegations in paragraph 42.

43. Fifth Third denies the allegations in paragraph 43.

44. Fifth Third admits that it sent additional correspondence in March regarding the termination of the agreement, states that the terms of this notice speak for themselves, and denies the allegations in paragraph 44 to the extent they conflict with these terms.

45. Fifth Third admits that the agreement did not renew and that plaintiff failed to deliver the stated Performance Enhancement, denies that the necessary performance metrics required for extension were reached, states that the letter speaks for itself, and denies the allegations in paragraph 45 to the extent they are inconsistent with its terms.

46. Fifth Third denies the allegations in paragraph 46.

47. Fifth Third denies the allegations in paragraph 47.

48. Fifth Third admits that it has made payments to S&P, states that it overpaid for S&P's services, and denies the remaining allegations in paragraph 48.

49. Fifth Third states that the terms of the agreements speak for themselves, and denies the allegations in paragraph 49 to the extent they are inconsistent with the terms.

50. Fifth Third admits that S&P sent an email on or about May 3, 2016, states that the emails speaks for itself, and denies the remaining allegations in paragraph 50.

51. Fifth Third admits that its legal counsel has had discussions with plaintiff's legal counsel about this case, states communications regarding settlement between counsel are protected by Federal Evidence Rule 408, and denies the remaining allegations in paragraph 51.

52. Fifth Third incorporates its prior responses as if set forth fully herein.

53. Fifth Third denies the allegations in paragraph 53.

54. Fifth Third denies the allegations in paragraph 54.

55. Fifth Third denies the allegations in paragraph 55.

56. Fifth Third incorporates its prior responses as if set forth fully herein.

57. Fifth Third denies the allegations in paragraph 57.

58. Fifth Third denies the allegations in paragraph 58.

59. Fifth Third denies the allegations in paragraph 59.

60. Fifth Third incorporates its prior responses as if set forth fully herein.

61. Fifth Third denies the allegations in paragraph 61.

62. Fifth Third denies the allegations in paragraph 62.

63. Fifth Third denies the allegations in paragraph 63.

64. Fifth Third denies the allegations in paragraph 64.

65. Fifth Third denies the allegations in paragraph 65.

66. Fifth Third incorporates its prior responses as if set forth fully herein.

67. Fifth Third denies the allegations in paragraph 67.

68. Fifth Third denies the allegations in paragraph 68.

69. Fifth Third denies the allegations in paragraph 69.

70. Fifth Third denies the allegations in paragraph 70.

71. Fifth Third denies the allegations in paragraph 71.

72. Fifth Third denies the allegations in paragraph 72.

73. Fifth Third incorporates its prior responses as if set forth fully herein.

74. Fifth Third denies the allegations in paragraph 74.

75. Fifth Third denies the allegations in paragraph 75.

76. Fifth Third states that the terms of the agreement speak for themselves, and denies the allegations in paragraph 76 to the extent they are inconsistent with those terms.

77. Fifth Third denies the allegations in paragraph 77.

78. Fifth Third denies the allegations in paragraph 78.

79. Fifth Third denies the allegations in paragraph 79.

80. Fifth Third incorporates its prior responses as if set forth fully herein.

81. Fifth Third denies the allegations in paragraph 81.

82. Fifth Third denies the allegations in paragraph 82.

83. Fifth Third states that the terms of the attachment speak for themselves, and denies any allegations inconsistent with these terms in paragraph 83.

84. Fifth Third denies the allegations in paragraph 84.

85. Fifth Third denies the allegations in paragraph 85.

86. Fifth Third denies the allegations in paragraph 86.

87. Fifth Third denies the allegations in paragraph 87.

88. Fifth Third incorporates its prior responses as if set forth fully herein.

89. Fifth Third denies the allegations in paragraph 89.

90. Fifth Third denies the allegations in paragraph 90.

91. Fifth Third states that the terms of the attachment speak for themselves, and denies any allegations inconsistent with these terms in paragraph 91.

92. Fifth Third denies the allegations in paragraph 92.

93. Fifth Third denies the allegations in paragraph 92.

94. Fifth Third incorporates its prior responses as if set forth fully herein.

95. Fifth Third denies the allegations in paragraph 95.

96. Fifth Third denies the allegations in paragraph 96.

97. Fifth Third states that the terms of the attachment speaks for itself, and denies any allegations in paragraph 97 inconsistent with those terms.

98. Fifth Third denies the allegations in paragraph 98.

99. Fifth Third denies the allegations in paragraph 99.

100. Fifth Third denies the allegations in paragraph 100.

101. Fifth Third denies the allegations in paragraph 101.

102. Fifth Third denies the allegations in paragraph 102.

103. Fifth Third incorporates its prior responses as if set forth fully herein.

104. Fifth Third denies the allegations in paragraph 104.

105. Fifth Third denies the allegations in paragraph 105.

106. Fifth Third denies the allegations in paragraph 106.

107. Fifth Third denies the allegations in paragraph 107.

108. Fifth Third denies the allegations in paragraph 108.

109. Fifth Third incorporates its prior responses as if set forth fully herein.

110. Fifth Third denies the allegations in paragraph 110.

111. Fifth Third states that this agreement was terminated as of December 31, 2015, and denies the remaining allegations in paragraph 111.

112. Fifth Third states that the agreement had been terminated as of March 10, 2016, and denies the remaining allegations in paragraph 112.

113. Fifth Third denies the allegations in paragraph 113.

114. Fifth Third denies the allegations in paragraph 114.

115. Fifth Third denies the allegations in paragraph 115.

116. Fifth Third denies the allegations in paragraph 116.

117. Fifth Third denies the allegations in paragraph 117.

118. Fifth Third incorporates its prior responses as if set forth fully herein.

119. Fifth Third denies the allegations in paragraph 119.

120. Fifth Third denies the allegations in paragraph 120.

121. Fifth Third denies the allegations in paragraph 121.

122. Fifth Third denies the allegations in paragraph 122.

123. Fifth Third denies the allegations in paragraph 123.

124. Fifth Third denies that plaintiff is entitled to its prayer for relief, and denies each and every allegation of in the complaint except to the extent specifically admitted herein to be true.

SECOND DEFENSE

125. Plaintiff's complaint fails to state a claim upon which relief can be granted.

THIRD DEFENSE

126. Plaintiff's claims are barred by a failure of consideration

FOURTH DEFENSE

127. Plaintiff's claims are barred by the doctrine of accord and satisfaction.

FIFTH DEFENSE

128. Plaintiff's claims are barred by its own contributory negligence and breach of contract.

SIXTH DEFENSE

129. Plaintiff's claims are barred by its failure to mitigate damages.

SEVENTH DEFENSE

130. Plaintiffs' claims are barred by the doctrine of estoppel.

EIGHTH DEFENSE

131. Plaintiffs' claims are barred by illegal conduct.

NINTH DEFENSE

132. Plaintiff's claims are barred by the doctrines of laches, waiver and/or unclean hands.

TENTH DEFENSE

133. Plaintiff's claims are barred by the failure to satisfy conditions precedent.

ELEVENTH DEFENSE

134. Plaintiff's claims are barred by its own lack of candor and bad faith, evidenced by its misrepresentations that it was performing an accurate analysis and calculation of the Performance Enhancement Realized, when in fact, it had not performed an accurate analysis and calculation, and it did meet the target for renewal of the attachment.

TWELFTH DEFENSE

135. Fifth Third Bank gives notice that it may rely upon other and further defenses as may become available or apparent during discovery and hereby reserves its right to amend its answer as to any such further defenses.

THIRTEENTH DEFENSE

136. Plaintiff's claims are barred on grounds of public policy.

FOURTEENTH DEFENSE

137. Plaintiff failed to comply with NY CLS Gen Oblig §§ 5-901 and 5-903.

WHEREFORE, Fifth Third respectfully requests that Plaintiff's Complaint be dismissed with prejudice; that Plaintiff take nothing by way of its Complaint; that Fifth Third be awarded its costs and reasonable attorney fees expended herein; and that Fifth Third be awarded such other and further relief to which Fifth Third may be entitled in equity or at law, or that the Court may deem just and equitable.

COUNTERCLAIM

For its counterclaim against Plaintiff, Fifth Third alleges as follows:

PARTIES

136. Fifth Third is an Ohio banking corporation with its principal place of business in Cincinnati, Ohio.

137. Upon information and belief, S&P Global Market Intelligence ("S&P) is a corporation organized and existing under the laws of the State of Delaware with its principal place of business located at 55 Water Street, New York, New York 10041. Upon information and belief, S&P Global Market Intelligence is a subsidiary of S&P Global Inc. f/k/a McGraw-Hill Companies, Inc. S&P has represented that, as part of an internal corporate reorganization, and pursuant to an assignment dated as of January 1, 2016, it acquired certain rights and obligations – including all rights and obligations related to the claims and allegations set forth herein – formerly belonging to Standard & Poor's Financial Services LLC.

JURISDICTION AND VENUE

138. This Court has subject-matter jurisdiction over the claims asserted in this action, pursuant to 28 U.S.C. § 1332, because the amount in controversy exceeds $75,000.00, exclusive of interest and costs, and because the dispute is between citizens of different states.

139. Venue is proper in this because S&P conducts business in this District; and a substantial part of the events giving rise to the claims occurred, and continues to occur, in this District.

COUNT ONE: BREACH OF CONTRACT

140. On or about February 23, 2009, Fifth Third and S&P entered into a Master Subscription Agreement, effective as of January 2, 2009 (the "MSA"). The MSA contemplated

that S&P could provide specific services to Fifth Third pursuant to subsequent service attachments to the contract.

141. On or about July 1, 2010, Fifth Third entered into an attachment to the MSA entitled "LCD Commercial Loan Performance Optimization Program Services Attachment to the Master Subscription Agreement," referred to herein as the First Attachment. Under the terms of this agreement, S&P pledged to review Fifth Third's confidential financial information and provide advice for making greater profits on certain Fifth Third products. S&P pledged to track and report the "Performance Enhancement Realized," which was defined as "the incremental revenue that the Bank achieves through the execution of one or more of the [S&P's] recommendations."

142. On or about October 1, 2012, Fifth Third and S&P amended Attachment 1 to condition its renewal upon S&P's achievement of a Performance Enhancement Realized of at least $7.5 million during the previous year.

143. On or about October 1, 2012, Fifth Third entered into second attachment to the MSA entitled "LCD Commercial Loan Performance Optimization Program Services Attachment to the Master Subscription Agreement," referred to herein as the Second Attachment. Under the terms of this agreement, S&P pledged to review Fifth Third's confidential financial information and provide advice for making greater profits on certain additional Fifth Third products. Once again, S&P pledged to track and report the "Performance Enhancement Realized," which was defined as "the incremental revenue that the Bank achieves through the execution of one or more of the [S&P's] recommendations."

144. Despite its contractual obligation to track Performance Enhancement Realized, S&P failed to do this. Upon information and belief, instead of tracking performance

enhancement realized as a result of implementation of S&P recommendations, S&P falsely recorded any and all increased revenue Fifth Third experienced as if it had resulted from implementation of S&P's recommendations rather than other facts. S&P knew that this was a false representation of performance enhancement. S&P used this false representation of performance to claim that the First Attachment had automatically renewed by its terms, when in fact it knew that it had not achieved the Performance Enhancement Realized milestones necessary for automatic renewal.

145. Under the attachments, S&P collected fees from Fifth Third that were calculated as a percentage of what S&P purported to be Performance Enhancement Realized, but were not, in fact, Performance Enhancement Realized.

146. S&P breached the MSA, the First Attachment, and the Second Attachment. As a result of these breaches, S&P collected millions of dollars from Fifth Third that were not rightly owed. Because S&P did not fulfill its obligations, Fifth Third did not receive the benefit of the performance enhancement it had been promised.

COUNT TWO: UNJUST ENRICHMENT

147. Fifth Third incorporates it prior allegations as if fully restated herein.

148. S&P continued to take payments from Fifth Third after it failed to perform the terms of the MSA, First Attachment, and Second Attachment, and after termination of the agreements.

149. S&P has benefited as a result of these improper collections at Fifth Third's expense.

150. Equity requires that S&P provide Fifth Third restitution of millions of dollars that were improperly retained.

COUNT THREE: PAYMENT BY MISTAKE

151. Fifth Third incorporates it prior allegations as if fully restated herein.

152. S&P collected payments of millions of dollars from Fifth Third that were based upon S&P's faulty calculation of Performance Enhancement Realized.

153. These payments were mistakenly paid. S&P has nonetheless retained these payments. S&P must return these payments.

WHEREFORE, Fifth Third respectfully requests that this Court enter judgment in its favor in an amount to be determined at trial, along with punitive damages, costs, reasonable attorney's fees to the extent allowed by law, and other relief as the Court may deem appropriate or allowed in equity or by law.

JURY DEMAND

Fifth Third hereby demands a trial by jury on all issues.

/s/ Victor A. Walton, Jr.
Victor A. Walton, Jr.

Respectfully submitted,

/s/ Victor A. Walton, Jr.
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Counsel for Fifth Third Bank

CERTIFICATE OF SERVICE

I hereby certify that on January 31, 2017, a true and accurate copy of the foregoing was filed electronically with the Court's CM/ECF system, which will send notification to all attorneys registered to receive such service. All other parties will be served by regular U.S. mail. Parties may access this filing through the Court's electronic filing system.

/s/ Victor A. Walton, Jr.
Victor A. Walton, Jr.